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May 3, 2007

Commissioner Jonathan Adelstein
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

In re: WT Docket Nos. 94-147 and 97-56
James A. Kay, Jr., and Marc D. Sobel
Motion to Modify Sanction

Dear Commissioner Adelstein:

As you will recall, James F. Green of Mercury Strategies, LLC, and I met with you and your Senior Legal Advisor, Barry Ohlson, on March 22, 2007, to discuss the pending *Motion to Modify Sanction* ("*Motion to Modify*") filed in the above-referenced matter by our clients, James A. Kay, Jr., and Marc D. Sobel (hereinafter, "Licensees"). Representatives of the Interagency Communications Interoperability System ("ICIS"), participated in the meeting via speakerphone.[1] ICIS is a cooperative effort of multiple local governments in the Los Angeles area operating a seamless regional interoperability system utilizing UFH spectrum in the 470-512 MHz band. If the alternative sanction is adopted as proposed in the *Motion to Modify*, Licensees will contribute to ICIS and/or other public safety entities, thirty clear UHF channels in the 470-512 MHz band, spectrum valued at a minimum of $30 Million.

Upon hearing directly from these public safety and first responder interests about the substantial public interest benefit that could result from the proposed contribution of spectrum, you expressed a renewed willingness to seriously consider the proposal. You expressed some frustration, however, at not having received certain relevant information you requested from the Office of General Counsel ("OGC") and the Wireless Telecommunications Bureau ("WTB"). We know that you are renewing your efforts to obtain the requested information and hope that you will find these offices more responsive than in the past. In the meantime, we wish to offer you some responsive information. While we do not expect you to rely on our submission in lieu of advice from the Commission's lawyers and operating Bureaus, we believe you will find it to be accurate and objective, and we trust it will be helpful in your consideration of this matter.

[1] The ICIS participants were Lucy Varpetian, Senior Assistant City Attorney, Glendale, California, and Donald Wright, Battalion Chief, Glendale Fire Department. Both are members of the ICIS Governance Board, and Mr. Wright is the Interim Executive Director of ICIS. In addition to ICIS, two Enforcement Bureau representatives were present: William Davenport, Assistant Bureau Chief, and Gary Schonman, Bureau staff attorney.

We discerned three general questions or areas of inquiry as to which you are awaiting input. They can be summarized and articulated as follows: (1) Does the Commission have the legal authority to modify the sanction in light of the fact that the judicial review process is has concluded and the Court of Appeals has issued its mandate? (2) Can the UHF spectrum offered under the alternative sanction plan be readily utilized by public safety entities, including ICIS, and through what procedures would it be made available for such use? (3) What is the significance of the monetary value of the spectrum at issue in this proposal, and how should the Commission evaluate that?

We know that you are awaiting guidance on the first item from OGC, and on the second and third items from WTB. This letter addresses the first item of inquiry. The second and third items will be addressed in a separate letter which is currently under preparation and will be submitted shortly.

Does the Commission have the legal authority to modify the sanction in light of the fact that the judicial review process is has concluded and the Court of Appeals has issued its mandate?

The appellate court ruling in this matter does not in any way preclude the Commission from taking the action proposed in the *Motion to Modify*. We understand that some in OGC have informally speculated, if not preliminarily advised, that the Commission may lack legal authority to modify the sanction because the Court of Appeals, after Supreme Court denial of certiorari, has issued the mandate affirming the FCC action. Some in OGC have apparently suggested that the Court would have to recall its mandate to permit the proposed modification of sanction. Any such advice is inaccurate, at least as applied to this matter.

Judicial review of most FCC actions is performed by United States Circuit Courts pursuant to 47 U.S.C. § 402. An appellate court's latitude in reviewing administrative agency actions is relatively narrow as compared to its plenary authority over lower court matters.[2] With very few exceptions, the Court's review is restricted to: (a) whether the FCC had statutory authority to take the type of action under review; (b) whether the particular action was lawful in

[2] As eloquently explained by Justice Felix Frankfurter:

> What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

FCC v. Pottsville Broadcasting Co. v. FCC, 309 U.S. 134, 141 (1940).

the circumstances, *i.e.*, not contrary to any applicable statute, treaty, binding precedent, not arbitrary or capricious, etc.; and (c) whether the action is based on a reasoned analysis supported by substantial record evidence. If those threshold standards are satisfied, the court will generally defer to the agency and will not substitute its own its own discretionary judgment for that of the Commission.

The issuance of the mandate terminates the judicial proceedings and returns jurisdiction to the agency. *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). The mandate sometimes accompanies an opinion modifying, correcting, or questioning the agency's action or reasoning. Any subsequent agency proceedings on the matter must take into account and apply the Court's interpretation. Less frequently the mandate may include specific directions to the agency to take or refrain from taking some particular action. In such cases the FCC is bound to follow the Court's directive. In the vast majority of cases, however, the Court simply rejects challenges to the FCC action and either dismisses or denies the appeal or otherwise affirms the FCC action. In such cases the mandate *per se* compels no specific action, and it certainly does not divest the Commission of the jurisdiction and public interest duty in had prior to the appeal.

The judicial mandate in this case is of this latter permissive type. It does not affirmatively direct or negatively enjoin any specific Commission action. The mandate returned jurisdiction to the FCC, over the objection of Licensees, marking the termination of judicial proceedings affirming the FCC action. The court held that the record supported the action under review, *not* that it compelled this particular action. The court held that the action under review withstood the legal challenges of Licensees, *not* that this was the only lawful result the FCC could have reached. The court rejected Licensees' legal objections to the agency action, but it did *not* hold that the particular action under review was the only legally permissible alternative. The issuance of the mandate, therefore, does not enjoin the Commission from subsequently taking an alternative, but equally lawful, action.

This conclusion is not surprising when it is understood that, even in cases where the Court finds error and remands the matter for further agency proceedings, the mandate does not deprive the FCC of its full jurisdiction and discretion, nor relieve it of its public interest obligations as conferred by Congress, which was firmly established in *FCC v. Pottsville Broadcasting Co. v. FCC*, 309 U.S. 134 (1940). The Commission denied an application for a broadcast license on grounds that the applicant lacked the requisite financial qualifications. The D.C. Circuit remanded on grounds that the financial disqualification rested on an erroneous interpretation of the applicable state law. On remand, the Commission reinstated the application but, rather than grant it, designated it for comparative consideration with two other mutually exclusive applications that had been filed in the interim. The applicant then obtained a writ of mandamus from the D.C. Circuit directing the Commission to grant the application.

The Supreme Court in *Pottsville Broadcasting* reversed, holding that the appellate court reversal did not compel the agency to restrict further proceedings on remand solely to the record, as it existed prior to the appeal. Mr. Justice Fankfurter, writing for the Court, explained:

> On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. … But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. … *Cf.* The Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity."

309 U.S. at 145, citing *Federal Power Commission v. Pacific Power and Light Co.*, 307 U.S. 156 (1939), and *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939). To hold otherwise, Frankfurter opined, "would mean that for practical purposes the contingencies of judicial review and of litigation, rather than the public interest, would be decisive factors." 309 U.S. at 145-146. See also, *Fly v. Heitmeyer*, 309 U.S. 146 (1940).

Pottsville Broadcasting thus teaches that a judicial mandate reversing for legal error does not restrict the FCC's statutory authority, limit its public interest obligations, or confine its discretion strictly to the correction of, beyond the obligation to correct the specific legal error. It stands to reason, therefore, that a judicial mandate entirely affirming the FCC action and lacking any specific direction certainly does not preclude the agency from taking further otherwise appropriate action that is entirely consonant with the decision reviewed by the Court, particularly when there is a compelling public interest consideration at stake, namely, the improvement, expansion, and enhancement of the capacity, coverage, and interoperability of first responder and public safety communications.

The proposed modification of sanction would not violate the Court's mandate for the added reason that it does not disturb the judgment on the merits, *i.e.*, the determination that Licensees' conduct constituted an unauthorized transfer of control and lack of candor. The scope and propriety of the sanction for these violations was not addressed in the Court's opinion, and can therefore not be properly considered part of the mandate. To hold that the Court's mandate reaches a matter not even addressed by the reviewing Court would be to exalt the technicalities of judicial jurisprudence over the imperatives of the Commission's duty to the public interest, precisely the sort of result that Justice Frankfurter anathematized in *Pottsville Broadcasting*.[3]

[3] For this reason, Section 402(h) of the Communications Act, which requires the Commission to implement the Court's judgment "upon the basis of the proceedings already had and the record upon which said appeal was heard and determined," does not preclude Commission consideration of the *Motion to Modify*. The judgment on the merits remains undisturbed, and the specific makeup of the sanction was not a matter "heard and determined" in the appeal. Adopting the course proposed in the *Motion to Modify* cannot be construed as even remotely constituting a failure to implement either the Commission's judgment or the mandate affirming it on appeal.

In the extremely unlikely event that, after considering the foregoing, the Commission nonetheless feels constrained by the mandate, that problem could be resolved by asking the Court to recall its mandate. Licensees neither propose nor desire this course of action, but they nonetheless believe a strong case could be made for such a recall, particularly if the request were filed jointly by Licensees and the Commission. There is no specific statutory provision for recall of judicial mandates, but it has long been deemed among the inherent powers of a court. *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412 at 416; *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 276-277 (D.C. Cir. 1971); Wright and Miller, *Federal Practice and Procedure* § 3938, at 712-16 (2d ed. 1996). Historically the power to recall a mandate expired with the judicial term in which it was issued, but this is no longer true in federal courts. By statute, federal courts are "deemed always open," and "[t]he continued existence or expiration of a session of a court in no way affects the power of the court to do any act or take any proceeding." 28 U.S.C. § 452. This has been interpreted specifically as giving federal courts a virtually perpetual power to recall mandates. See *Greater Boston Television*, 463 F.2d at 276-277; *Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997).

The criteria for recalling a mandate require a demonstration of "exceptional circumstances" sufficient to outweigh a strong public policy in favor judicial finality. The idea is that once a matter has been finally adjudicated, "the parties thereafter are entitled to rely upon such adjudication as a final settlement of their controversy." *BellSouth Corp. v. FCC*, 96 F.3d 849, 851 (6th Cir. 1996); citing *Hines v. Royal Indemnity Co.*, 253 F.2d 111 (6th Cir. 1958). The following is typical of the standard as often articulated in civil litigation cases: "The 'good cause' requisite for recall of mandate is the showing of need to avoid injustice." *Hines v. Royal Indemnity*, 253 F.2d at 114. When two important factors in this case are considered and weighed, however, the scales tip in favor of recall.

First, the only parties to the judicial proceedings (as well as to the proceedings before the agency) were the FCC and Licensees. As *BellSouth Corp.* and *Hines* indicate, the judicial policy in favor of finality is not a mere abstraction or theoretical principle. It is for the benefit and protection of "the parties" who are "entitled to rely" upon the finality of the judgment.[4] But if

[4] For similar reasons, this case does not present the concern at issue in *Greater Boston Television.*, namely, the effect a recall of the mandate would have on the vested rights of third parties. The Court there denied an FCC request to recall its mandate in an appeal from a comparative proceeding. The case has a long and complicated factual pattern and procedural history, but for our purposes it is sufficient to note that, in refusing to recall the mandate, the Court deemed it a "critical fact" that the recall would effectively rescind a construction permit the Commission had issued "following this Court's mandate," and that the grant had become "a final order." 463 F.2d at 286. There are no such concerns in this case. First, there are no other parties to the proceedings. Second, the revocation of the 800 MHz licenses has not become final. On August 23, 2005, prior to the issuance of the Court's mandate, Licensees submitted a Motion for Stay asking the Commission to stay the effectiveness of the revocation order pending final action on the *Motion to Modify*. That motion remains pending. In addition, commending in October of 2005, prior to conclusion of the appellate proceedings, and at regular intervals since, Licensees have requested 90 day extensions of operating authority pending consideration of the *Motion to Modify*, and have concurrently filed "applications" to extend authority as to each affected call sign. These filings are within the scope of Section 9(b) of the Administrative Procedure Act, which provides in pertinent part: "When [a] licensee has made timely ... application for a renewal or a new license ... a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." 5 U.S.C. § 558(c).

there are no parties other than those jointly seeking recall of the mandate, the policy of finality for the sake of the parties is an empty gesture.[5]

Second, in the case of an FCC matter, the concept of "injustice" should be broadened to include important public interest matters. Unlike civil courts, the FCC does not adjudicate disputes between parties over purely private rights. The Commission is charged with adjudicating, protecting, and advancing the public interest. When the totality of the circumstances is considered, the substantial public interest benefit to public safety and first responder communications that would result from modification of the sanction would be deemed "good cause" for recalling the mandate.

Finally, it must be noted that a recall of the mandate would only be a preliminary step. The immediate effect of the recall would be to return jurisdiction of the matter to the Court. Presumably the Court would also entertain a motion to remand the matter to the Commission so that the sanction could be modified. For the reasons previously stated, however, the requested modification is not precluded by the mandate. This procedure is therefore unnecessary and Licensees respectfully urge the Commission not to pursue it.

We hope the foregoing is responsive and helpful to you. Do not hesitate to contact us if you have any questions or if we can provide any additional information.

Very truly yours,

Robert J. Keller
Counsel for James A. Kay, Jr., and Marc D. Sobel

cc: (see attached service list)

[5] The absence of any third parties with vested interests in this matter also colors, to a large extent, the impact of the mandate itself, even if not recalled. In other words, it affects at least the weight and emphasis of the analysis discussed at pages 2-4, above.

Certificate of Service

I, Robert J. Keller, counsel for James A. Kay. Jr., and Marc Sobel d/b/a Air Wave Communications, hereby certify that on this 3rd day of May, 2007, I caused copies of the foregoing letter to Commissioner Jonathan Adelstein to be served by hand delivery and/or electronic mail (with courtesy copies also sent via regular mail) on the following:

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